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No. 79-490

In the Supreme Court of the United States

OCTOBER TERM, 1979

PENNSYLVANIA BANK AND TRUST COMPANY, ETC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The sole question presented in this federal estate tax case is whether the decision below correctly held that the decedent's gross estate included the value of property over which she possessed a general power of appointment, as defined in Section 2041 of the Internal Revenue Code of 1954 (26 U.S.C.), even though she was legally incompetent at all times during the existence of the power and thus unable to exercise it under local law.

The pertinent facts may be summarized as follows: Petitioner is the executor of the estate of the decedent Ethel Brice. The decedent died testate on August 15, 1969, four years after the death of her husband, James Brice (R. 136, 137).[1] In his will, the decedent's husband established

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[1] "R." refers to the record appendix filed in the court of appeals.

a trust for the benefit of the decedent under which she was given the right during her life to consume or appoint by will the entire principal of the trust (Pet. App. 2a; R. 136). Shortly after her husband's death, the decedent was declared mentally incompetent on March 31, 1965 (R. 136). At no time between February 9, 1965, the date of death of the decedent's husband, until her own death on August 15, 1969, did the decedent exercise the general power of appointment created under the will of her husband (Pet. App. 2a).

Petitioner included the trust property subject to the decedent's power of appointment (valued at $717,391.08) in the decedent's gross estate on the federal estate tax return. It paid the estate tax due as shown on the return, but subsequently filed a claim for a refund, asserting that the trust corpus was not includable in the decedent's gross estate.

After the Commissioner disallowed petitioner's claim for a refund, it instituted this refund suit in the United States District Court for the Western District of Pennsylvania (Pet. 5; R. 137). The district court upheld the Commissioner's determination that the decedent's gross estate included the value of the trust property subject to the power of appointment. It ruled that an "exercisable" power of appointment, as that term is used in Section 2041, refers to the existence of the power in the decedent's behalf, rather than to the decedent's actual ability to exercise the power of appointment under local law at the time of death. Because the decedent's power by its terms was exercisable in favor of herself, the district court concluded that she had a general power of appointment despite her inability to exercise the power under local law (R. 145). The court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a-6a).

1. The decision below correctly held that the decedent's gross estate included the value of the trust property over which she had a power of appointment. Section 2041(a)(2) of the Code provides that the gross estate shall include the value of all property with respect to which the decedent has at the time of his death a "general power of appointment" created after October 21, 1942, whether or not the power has been exercised by the decedent. Section 2041(b)(1) defines a general power of appointment as a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. As defined by her husband's will, the decedent's power of appointment was exercisable in such a manner. Under terms of the statute, it is therefore a general power of appointment within the meaning of Section 2041(b)(1).

The decision below is in accord with *Fish* v. *United States*, 432 F.2d 1278 (9th Cir. 1970). There, the court held that the inclusion of property in a decedent's gross estate is determined by the nature of the power as defined in the instrument creating the power, not by the donee's legal capacity to exercise that power. See also *Alperstein* v. *Commissioner*, 71 T.C. 351 (1978), appeal pending, No. 79-4116 (2d Cir.). The focus of Section 2041(a)(2) is on the decedent's property at the time of his death. Thus, as the court in *Fish* correctly observed (432 F.2d at 1280 n.3), if estate tax liability turned on the mental capacity of the decedent at the time of his death, the capacity of every donee of a power of appointment would be called into question because many of these people suffer some mental debilitation prior to death.

The decision below is also consistent with the legislative history of Section 2041. In 1942, Congress specifically amended the predecessor of Section 2041, which taxed only exercised powers of appointment. The revised statute

requires the inclusion of property subject to a power of appointment whether or not the power was exercised by the decedent. See Section 403(a) of the Revenue Act of 1942, ch. 619, 56 Stat. 942.[2] Since Congress enacted special relief provisions for donees of pre-1942 powers who were under a legal disability at the time of the change in the law (Section 403(d)(2) of the Revenue Act of 194 (56 Stat. 944)), it is clear that it intended that a post-1942 power held by a donee subject to a legal disability would be included in the donee's gross estate. If Congress intended to provide an exception for donees subject to a legal disability, it could have easily done so in Section 2041(b)(1), which contains certain express exceptions to the definition of a general power of appointment.

Finally, the court's interpretation of the term "power of appointment" in Section 2041(a)(2) is consistent with Section 2056, which allows an estate tax marital deduction for a property interest passing from the decedent to his spouse consisting of a life estate coupled with a general power of appointment. Section 2056(b)(5) provides that property subject to a power of appointment in the surviving spouse is eligible for the marital deduction if the power is "exercisable by such spouse alone and in all events." The Internal Revenue Service has ruled (Rev. Rul. 75-350, 1975-2 Cum. Bull. 367) that the legal capacity of the surviving spouse to exercise the power is irrelevant in determining the availability of the marital deduction under Section 2056(b)(5). If the rule were otherwise, the Service has pointed out that it could never be determined whether the surviving spouse could exercise the power "alone and in all events." On the other hand, under petitioner's position, the estate of the first

[2]Amending Section 811(f) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)).

spouse to die may receive a marital deduction with respect to property which is subsequently excluded from the estate of the remaining spouse because of his or her incompetency, so that the property would be taxed in neither estate—a result Congress carefully sought to avoid.[3] See S. Rep. No. 1013, Pt. 2, 80th Cong., 2d Sess. 16 (1948); *United States* v. *Stapf*, 375 U.S. 118, 128 (1963). The only reasonable solution is that adopted by the decision below and the Service's ruling, *viz.*, that the legal capacity of a person to exercise a power of appointment is irrelevant both for purposes of determining the marital deduction allowable to the donor's estate and for determining the gross estate of the donee.

2. Petitioner contends (Pet. 6-12) that the decision below creates a potential conflict with other courts of appeals because four lower courts have held that the existence of a power of appointment does not trigger inclusion of the property subject to the power in the absence of legal capacity of the donee.[4] But conflicting trial court decisions do not provide a basis for invoking the discretionary jurisdiction of this Court.

Petitioner alternatively requests (Pet. 17) that the Court defer its decision on the petition pending resolution of the cases on appeal. But petitioner's request would require an inordinate delay in the Court's disposition of the instant

[3]Indeed, the record shows (R. 144) that the estate of the decedent's husband claimed and was allowed a marital deduction for the value of the property interest passing to the decedent.

[4]*Finley* v. *United States*, 404 F. Supp. 200 (S.D. Fla. 1975), appeal pending, No. 78-1066 (5th Cir.); *Estate of Gilchrist* v. *Commissioner*, 69 T.C. 5 (1977), appeal pending, No. 78-2400 (5th Cir.); *Williams* v. *United States*, 78-2 U.S. Tax Cas. para. 13,264 (W.D. Tex. 1978); appeal pending, No. 78-3797 (5th Cir.); *Estate of Reid* v. *Commissioner*, 71 T.C. 816, appeal pending, No. 79-3005 (5th Cir.).

case. Only one of those cases has been scheduled for oral argument in the court of appeals, and that case presents a jurisdictional issue which may preclude the court from even reaching the substantive issue presented here.[5] In these circumstances, there is no justification for petitioner's request for delay in the consideration of the petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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[5] *Finley* v. *United States*, *supra*, has been set for oral argument by the Fifth Circuit on December 4, 1979. In that case, the taxpayer filed a petition in the Tax Court for a redetermination of the estate tax liability after the refund suit was instituted in the district court. The government has argued that the district court lost jurisdiction over the case in accordance with Section 7422(e) of the Code when the petition was filed in the Tax Court. Should the court of appeals accept the government's jurisdictional argument, it will not reach the issue raised in the instant petition.

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